

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION  
APPEALS DIVISION

**295.1302.850**  
5/16/91

In the Matter of the Petition )  
for Redetermination and Claim )  
for Refund Under the Sales )  
and Use Tax Law )  
 )  
 )  
 )  
Petitioner )

DECISION AND RECOMMENDATION  
No. ----

The above-referenced matter came on regularly for hearing before Hearing Officer Tony Nevarez on January 29, 1991, in Hollywood, California.

Appearing for Petitioner/Claimant: X----

Appearing for the Sales and Use Tax Department: Y----

Protested Item

The protested tax liability for the period October 1, 1986 through September 30, 1989, is measured by:

<u>Item</u>	<u>State, Local and County</u>
Unreported vaccination charges collected in connection with sales of animals; test basis	\$330,686

Petitioner's/Claimant's Contentions

Petitioner/claimant contends (1) that fees charged for vaccinations are exempt charges for services, (2) that its charges for vaccinations are exempt from tax because it employs licensed veterinarians and that such veterinarians are, by statute, consumers and not retailers of the drugs and medicines used, (3) that its vaccination services are not taxable because they are required by law, (4) that the Board should not now impose the tax because prior audits have treated the charges as exempt services, and (5) that imposition of tax on vaccination receipts included within the measure of tax constitutes a violation of the Equal Protection Clause of the U.S. Constitution.

Summary

Petitioner / claimant (hereinafter "petitioner") is a local governmental entity which makes retail sales of used equipment and surplus property as well as selling items through its stores

inside county jails, and selling items produced by inmates. In addition to its various selling activities, the petitioner impounds and sells animals as part of its animal control duties. Dogs, cats, and various other food and non-food animals are collected and disposed of through the animal shelters. A prior audit was conducted through September of 1985.

During this audit, audit staff representing the Sales and Use Tax Department (Department) examined petitioner's operations in great detail. It was noted that approximately 20 different county departments make retail sales and report through this one permit. With respect to the county animal care and control shelters, the subject of this protest, the Department examined sales records of animals redeemed by their owners and animals sold to new owners.

The month of November 1989, was chosen as a test period and a percentage of animals sold with vaccination was derived and broken down between dogs and cats. This percentage was then multiplied by the number of animals sold throughout the audit period to derive the total number of dogs and cats sold with vaccinations. It was found that some animals were vaccinated prior to being sold and that some of the animals received one vaccine and some received two vaccines. A \$330,686 measure of tax understated was derived, comprised of charges collected as vaccination fees. Only the vaccination fees collected in connection with a sale of an animal were included in the measure. The Notice of Determination issued on May 22, 1990 and this petition for redetermination were timely filed.

During the hearing, petitioner explained its operations at the seven animal control shelters it operates throughout the county. All animals collected within the jurisdiction of the county are brought to one of the seven shelters. It was explained that the dogs and cats (hereinafter "animals") collected are immediately vaccinated with the distemper vaccine upon reaching the facility. The distemper vaccination is mandatory for all animals irrespective of the animal's final disposition. Some animals, basically the dogs over four months old, are required to have a second vaccine for rabies.

Some of the animals, according to petitioner, are retrieved by the owner. Those owners pay impound and board fees and a fee to cover the cost of the vaccine or vaccines administered. Petitioner explained that no tax is collected on these charges since there is no sale of an animal, merely a recovery of costs incurred by the county. Petitioner and the Department stated the opinion that these costs recovered are exempt as charges for provision of services.

Other animals, continued petitioner, are purchased outright by new owners. When the new owner "adopts" an animal, the owner pays a "placement" fee (\$10 for dogs, \$2 for cats), a dog vaccination fee of \$4 for the distemper vaccine, a dog vaccination fee of \$7 for the rabies vaccine, if applicable, (a flat \$4 vaccination fee for cats), and a license fee if required. No other amounts are charged for the animal. According to petitioner, tax is charged only on the placement fee; no tax is charged on the fees for the vaccination or on the license fee. Only the taxability of the fees charged for the vaccination of animals sold is at issue here.

Petitioner cited to several reasons for its billing practices, most notably, petitioner stated its belief that the vaccination fee represents an exempt charge for the services provided by the county veterinarian and that its practices and charges are the same whether the animal is sold or retrieved by its owner. Additionally, petitioner cited to Revenue and Taxation Code Section 6018.1 which states that licensed veterinarians are consumers, and not retailers, of drugs and medicines used or furnished by them in performance of professional services. The fact that the

vaccines are required by law to be administered to the animals upon being impounded and before being sold was cited by petitioner as another reason for not taxing the charges collected for the vaccinations. Petitioner also stated that prior audits have not questioned its practice of not collecting tax on the vaccine fees and have treated the vaccine fees as exempt services and that it would be unfair to impose tax on these receipts at this time.

During the hearing, the audit staff explained that they included within the measure of tax only those vaccination fees collected in connection with an outright sale (adoption) of an animal. The collection of the "placement fee" constitutes a sale of the animal, continued the Department. The Department contended that, although petitioner is a governmental entity, its sales of animals should be treated the same as sales made by any other retailer of animals. The Department maintained that in this context, "gross receipts" include veterinary services or inoculations which are a part of the sale. What is being sold is not vaccines, but an animal, continued the Department, and the gross receipts from the sale of the animal include all services which are a part of the sale price.

In addition to the testimony noted above, an extensive brief was submitted by petitioner and it comprises part of the record in this case. The brief sets forth arguments in support of its petition for redetermination and makes a claim for refund.

#### Analysis and Conclusions

The Revenue and Taxation (Rev. and Tax.) Code imposes a sales tax upon the privilege of selling tangible personal property at retail. Liability for the tax is not extinguished until the tax is paid or satisfactory proof of exemption is shown. (See, generally, Rev. and Tax. Code, sections 6051, et. seq.; Western L. Co. v. State Bd. of Equalization (1938) 11 Cal.2d 156, 164.)

Governmental entities are not exempt from the taxing provisions cited above. Revenue and Taxation Code section 6015 defines "Retailer" to include:

"(a) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others..."

A "seller" is further defined by Revenue and Taxation Code section 6005 to include:

" ... any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit of creditors, trustee, trustee in bankruptcy, syndicate, the United States, this State, any county, city and county, municipality, district, or other political subdivision of the State, or any other group or combination acting as a unit." (Emphasis added.)

A sale of an animal is a sale of tangible personal property subject to the taxing provisions of law whether the animal is sold by a private retailer or a government entity. Business Taxes Law Guide Annotation 530.0140 (11/2/65) provides a succinct summary of Board policy with respect to the sale of impounded animals by local governmental entities. The ruling states in relevant part:

"... the sale of impounded animals by municipalities or counties is subject to the tax .... The fact that the amount received for the animals is designated as a

'placement fee' does not appear material. It is, whatever called, a consideration paid for the animals."

In accord with this ruling is Annotation 530.0160 (1/31/51). Both these rulings are based upon an Attorney General's opinion Number NS3763, dated September 4, 1941, which answered the precise question of whether the sale of impounded animals was subject to tax.

Since the sale of animals are taxable sales, the measure of tax is the retailer's "gross receipts" which is defined as the total amount of the sale price of all retail sales without deduction for costs of materials used, labor or service cost, interest paid, losses, or any other expense involved in reaching the final product. (Rev. and Tax Code, sections 6011(a) (2); 6012(a) (2).) Gross receipts do not include the price received for labor or services used in installing or applying the property sold. (Rev. and Tax. Code, sections 6012(c)(3); 6011 (c)(3).)

Petitioner's argument that the veterinarians' services are exempt services is disposed of by reference to the above quoted sections. As noted, the sales of impounded animals by petitioner are retail sales. The total sale price of the animal thus includes all costs for labor or services required to prepare the final product for sale. The vaccines are given prior to the sale, thus the veterinary services are utilized prior to sale and are utilized in order to ready the animal for sale. The petitioner does not sell vaccines; petitioner sells animals. Similarly, the purchasers do not come to petitioner's shelters to purchase vaccines, they come to purchase an animal.

Were the veterinary services to be utilized after the sale to "install or apply the property sold," such as vaccinating an animal owned by another individual, such services might well be exempt from the tax since the argument might be made that only the vaccine was being sold. That argument cannot be made here. Here, an animal is being sold, with vaccines administered. I find that the charges for veterinary services are not exempt services, rather they are services which are included in the sale price.

Petitioner contends that the charges for vaccines administered by its licensed veterinarians are exempt from the tax pursuant to law and cites to section 6018.1 of the Revenue and Taxation Code. Section 6018.1 applies the taxing provisions of law to veterinarians thusly:

"A licensed veterinarian is a consumer of, and shall not be considered a retailer within the provisions of this part with respect to, drugs and medicines used or furnished by him or her in the performance of his or her professional services.

"For the purposes of this section, 'drugs and medicines' includes substances or preparations intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in animals and which is commonly recognized as a substance or preparation intended for this use. The term includes legend drugs, pills and capsules (other than vitamins), liquid medications, injected drugs, ointments, vaccines, intravenous fluids, and medicated soaps if those soaps are available only to veterinarians. The term does not include vitamins, shampoos, pet foods, prescription diet foods, artificial diets, flea powders, and flea sprays."

My review of this section and its legislative history leads me to conclude that the exemption provided in section 6018.1 does not apply to this situation. An uncodified section of the enacting legislation, Section 1, of chapter 1585, statutes of 1985, provides as follows:

"It is the intent of the Legislature in enacting this act to clarify ambiguities in existing law regarding drugs and medicines prescribed by veterinarians in the practice of veterinary medicine." (Emphasis added.)

The statute speaks to the "practice of veterinary medicine." Committee analyses of the then pending legislation recognized that the practice of veterinary medicine is a labor intensive service and that any drugs or medicines dispensed in connection therewith were dispensed only incidentally to the provision of the service. It appears that the statute was intended to apply in the situation where an owner comes to a practicing veterinarian for medical treatment of their animal. Such a case is one where the veterinarian is providing a service and provision of the drugs or medicines is incidental to the service.

Here, on the other hand, the petitioner is not in the practice of providing veterinary services, rather, the county is inoculating an animal with a vaccine in preparation for sale. In this context, the county is acting as a retailer of animals and, just as in the retail pet store context, the total receipts, which include the costs of vaccinations, from the retail sales of the animals are taxable receipts. At this juncture, it is important to note that my conclusion that the statute does not apply in this situation is intended to apply only in the context where the animal is sold, or "adopted" as the term is used by petitioner.

The contention that petitioner is required by law to administer the vaccines provides no basis to exempt a portion of gross receipts from the measure of tax. The law is replete with instances wherein extra duties and costs are imposed upon manufacturers and retailers. The examples of seat belts and smog equipment come readily to mind. Such items of equipment are required by law on automobiles being sold in California. Nonetheless, the costs of these items are not excluded when calculating the total sale price of a vehicle sold in California. I conclude that the fact that the vaccinations are mandatory is not a sufficient basis upon which to exclude the charges from the measure of tax.

Petitioner also makes the argument that the claimed exemptions should be allowed because prior audits have allowed the charges as exempt and have not questioned the petitioner's practices. The fact that prior audits may have overlooked potentially taxable items or transactions does not exempt similar items or transactions from the tax in later audits. Petitioner's contention thus reduces to an argument that the Board should be estopped from collecting the tax because it relied upon prior communications from the Board. Reliance upon an oral communication from Board employees will never suffice to prove any fact or to prove entitlement to an exemption from the tax. Moreover, even if the petitioner was informed by the audit staff that no tax was due on sales, it has been repeatedly held that oral advice given by a Board employee is not binding upon the Board. (Rev. and Tax. Code, section 6596; Market St. Ry. Co. v. State Bd. Equal. (1955) 137 Cal.App.2d 87, 103.) Revenue and Taxation Code section 6596 provides the only basis for relief in a situation wherein the petitioner claims reliance upon erroneous advice from Board employees. The section provides as follows:

"(a) If the board finds that a person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from the board, the person may be relieved of the taxes imposed by sections 6051 and 6201 and any penalty or interest added thereto.

"(b) For the purpose of this section, a person's failure to make a timely return or payment shall be considered to be due to reasonable reliance on written advice from the board, only if the board finds that all of the following conditions are satisfied:

"(1) The person requested in writing that the board advise him or her whether a particular activity or transaction is subject to tax under this part. The specific facts and circumstances of the activity or transaction shall be fully described in the request.

"(2) The board responded in writing to the person regarding the written request for advice, stating whether or not the described activity or transaction is subject to tax, or stating the conditions under which the activity or transaction is subject to tax." (Emphasis added.)

As noted by the emphasized text, only written communications from the Board are sufficient to make a case for reliance upon erroneous advice. This argument provides petitioner no basis for relief.

Finally, petitioner advances the argument that the Board's taxing of vaccination charges as part of gross receipts from the sale of an animal constitutes a violation of the Equal Protection Clause of the United States Constitution because the Board does not also tax charges collected from vaccinations administered to animals retrieved by their owners. Although I am unable to rule on an issue of constitutional dimension in an administrative proceeding, I do note that exemptions from tax are a matter of legislative grace and may be granted or withheld by the legislature as it sees fit. (Southern California Edison Co. v. State Board of Equalization (1972) 7 Cal.3d. 652, 660.) Moreover, most classifications for tax purposes will generally be upheld so long as the classification works uniformly upon all persons in a class and the classification is based upon a reasonable distinction." (See generally, Simplicity Pattern Co. v. State Bd. of Equalization (1980) 27 Cal.3d 900, 912, and authorities cited therein.) Nonetheless, petitioner's contention is duly noted for the record.

Section 6091 of the Revenue and Taxation Code states the presumption that all gross receipts are subject to the tax until the contrary is established. The burden of proving entitlement to an exemption from the tax is upon the taxpayer and does not shift from the taxpayer to the Board since the taxpayer is in the best position to create and maintain records of his transactions. (H. J. Heinz Co. v. State Board of Equalization (1962) 209 Cal.App.2d. 1, 4; Pope v. State Bd. of Equalization (1988) 202 Cal.App.3d 73, 84.) Petitioner has not surmounted its burden of proving by clear and convincing evidence its entitlement to the exemption. Such being the case, the determinations of the Department must be upheld.

#### Recommendation

Redetermine without adjustment. Deny the claim for refund.

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Tony Nevarez, Hearing Officer

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5/16/91  
Date